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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. **77-745**

OWENS-ILLINOIS, INC.,
Petitioner,

v.

JOHN SCHULTZ, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

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JOHN SCHULTZ, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Seventh Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 19, 1977.

CITATION TO OPINION BELOW

The Opinion of the District Court for the Southern District of Illinois sustaining Petitioner's Motion to Dismiss is printed in Appendix A hereto, and the District Court's Memorandum Order concerning Motion to Amend, Modify and Reverse is

printed in Appendix B hereto. The Opinion of the United States Court of Appeals for the Seventh Circuit which reversed the judgment of the District Court is printed in Appendix C hereto and is reported in the official reports at 560 F.2d 849.

JURISDICTION

The judgment of the Court of Appeals printed in Appendix C hereto was entered on August 19, 1977. On September 20, 1977 the Court of Appeals denied Petitioner's Motion for Re-hearing *En Banc*, and on October 14, 1977 the Court of Appeals refused to Stay its Mandate pending the filing of the Petition for Writ of Certiorari and a final determination thereon by this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions involved are the Due Process Clause of the Fifth Amendment to the United States Constitution. The statute involved is the Labor Management Relations Act, as amended, 29 U.S.C. §185(a). These provisions are printed in Appendix D hereto.

THE QUESTIONS PRESENTED

I

Whether or not an apprenticeship program incorporated by reference into a collective bargaining agreement creates rights which are so "uniquely personal" to employees within the

meaning of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, as to vest individual employees with a right of action against their Employer and labor organization pursuant to §301 of the Labor Management Relations Act, as amended, 29 U.S.C. §185?

II

Whether or not the Court of Appeals may interpret provisions of the collective bargaining agreement and determine that individual employees covered by said agreement were the object of arbitrary or invidious discrimination or otherwise the object of fraud and deceit where there exists a dispute as to the application and interpretation of such contract and where no evidence has been adduced either in arbitration proceedings or in trial before District Court?

STATEMENT OF THE CASE

Respondents¹ brought this action pursuant to Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. §185(a) alleging, *inter alia*, that no employee had been permitted to enter a contractually established apprenticeship program for some year and one-half because of an alleged agreement between Petitioner Owens-Illinois and District 9, International Association of Machinists and Aerospace Workers² to eliminate said program (R 3-4).³ Plaintiffs also alleged that its members had grieved over the failure to enroll them as apprentices and further that the grievance was not processed through arbitration because District 9 engaged in conduct which

¹ Hereinafter referred to as the "Plaintiffs".

² Hereinafter referred to as "Owens-Illinois" and "District 9" respectively.

³ This designation is to the Appendix before the Court of Appeals.

was both "spurious" and in "bad faith" (R 3-4). Also averred was a claim that the grievance was not pursued because of an "informal agreement" between Owens-Illinois and District 9 which eliminated the grounds upon which said grievance could have been otherwise brought (R 3-4). This "informal agreement" obviously occurred during the 1971 contract talks inasmuch as the current collective bargaining agreement spans the period October 1, 1974 through March 31, 1977 and the Complaint allegations concerning the "informal agreement" clearly refer to the 1971 negotiations, making obvious reference to a preceding contract (R 4, Para. 10).

The current collective bargaining agreement contains the following provisions which the court relied upon to reach its decision:⁴

* * * * *

ARTICLE 20

Apprentices

"Section 1. It is agreed that the terms and the conditions of the Apprenticeship standards for machinists as developed by the International Association of Machinists, and Aerospace Workers, District No. 9, shall remain in effect for the life of this contract. By agreement of the Union and the Company, the Apprenticeship Program in the Machine Manufacturing Shop has recognized and continues to recognize the practice of a restricted pool, that is, the selection of Apprentices from personnel within the Shop in conjunction with the District No. 9 Joint Apprenticeship Committee.

Section 2. The normal ratio of apprentices shall be one (1) apprentice to every eight (8) Master Machinists in the department. Apprentices shall serve for a period of 8,000

⁴ Appendix C.

hours in accordance with the Federal Apprenticeship Standard Agreement."

No evidence was before the Court relating to collective bargaining for the 1971 and 1974 contracts reflecting the intent and agreement of the parties, the egregious surplus of journeymen machinists from 1971 to present, and the full discussions between the employees and union at the time of ratification other than the "Summary of Changes" (Sup. App. 49).⁵ Further no evidence was before the court hearing upon the alleged "spurious" and "bad faith" nature of the alleged "informal agreement". Finally no evidence was before the Court relating to any arbitrary or invidious discrimination practiced against the complaining employees.

On December 3, 1976, the District Court sustained Petitioner's Motion to Dismiss for the reason that pursuant to § 301 the union is ordinarily the proper party to seek enforcement of a collective bargaining agreement except where "uniquely personal" rights of employees were concerned and that the apprenticeship program was not "uniquely personal" to Plaintiffs. Thereafter, Respondents made a Motion to Amend, Modify and Reverse the District Court's Order of December 3, 1976, and on January 3, 1977, the Court denied the Motion reiterating its previous opinion that the apprenticeship program was not "uniquely personal" to the employees and that before an individual employee may bring an action the rights asserted must be vested in him at time of suit.

On August 19, 1977, the United States Court of Appeals for the Seventh Circuit held that Plaintiffs had sufficiently alleged a factual predicate establishing the vesting of their entitlement to participate in the apprenticeship program and it was therefore appropriate for them to sue Petitioner pursuant to §

⁵ Filed by District 9 before the Court of Appeals.

301. The Court also held that the employees were entitled to sue their labor organization by reason of their allegations that the union breached its duty of fair representation. Lastly, the Court of Appeals in remanding the case to District Court, held that Article 20 of the collective bargaining agreement established a "mandatory apprenticeship program" which precluded the union from defending its failure to process Respondent's grievance on the grounds that it was without merit.

REASONS FOR GRANTING THE WRIT

A. The Authority of Bargaining Unit Members to Interpret the Contract.

This case is concerned with efforts to further define the term "uniquely personal" as used by this Court in *Smith v. Evening News Association*, 371 U.S. 195 (1962); and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and to delineate those benefits established by a collective bargaining agreement which are susceptible of enforcement by an individual employee-union member notwithstanding the union's contrary interpretation and application of the labor contract. Also important to the orderly development of federal labor policy is a determination as to the propriety of the Court of Appeals decision wherein it interpreted the contract provision in question, Article 20 relating to apprenticeship, in a manner binding upon the parties before any evidence whatever was produced relating to the actual agreement of the parties.

The contract itself plainly reflects that the apprenticeship program is not designed to benefit any specific individual but to enhance the well being of the bargaining unit as a whole and as such it is the union and not its individual member which is responsible for enforcement. The first decision to sharply define the right of an individual employee to bring suit for an alleged violation of a union contract was that of *Smith v. Evening News Association*, 371 U.S. 195 (1962). There this Court held that employees had the right to sue their employer for refusing to assign them work because "the rights of individual employees concerning rates of pay and conditions of employment are a major focus of . . . collective bargaining agreements". Since that time the individual's right to sue over matters such as seniority standing has been recognized. *Humphrey v. Moore*, 375 U.S. 335 (1964), and in *Hines v. Anchor Motor Freight*,

Inc., 424 U.S. 554, 96 S. Ct. 1048 at 1055 (1976), the individual's right to sue was defined as:

"Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications §301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as *wages, hours, overtime pay, and wrongful discharge*." (Emphasis added).

The line must be drawn somewhere to distinguish between those things personal and those which impact upon all union members for there to be a distinction with a difference. This is so for a very important reason either overlooked or ignored by the Appellate Court and never reached by the trial court, *viz*: Both journeymen and apprentices can perform skilled work and the Company retains, by contract, the right to determine its total skilled workforce headcount, a mandatory journeyman-apprentice ratio will result in each unnecessary apprentice displacing journeymen where more journeymen are employed than are needed. Therefore, here the union has an obligation to reconcile the job protection interests of *current* journeymen with the job aspiration interests of plaintiffs during this economic period when additional apprenticeships are unwarranted due to the excess supply of journeymen. What plaintiffs (now with the aid of the Appellate Court) seek under §301 is a requirement that the union champion plaintiffs' aspirations at the expense of current journeymen's jobs—a result at war with the real purpose of the "fair representation" principle that the union do what is best for the bargaining unit *as a whole*, rather than advocate the interests of one minority against another.

Insofar as counsel is aware no court of appeals has ever determined the subject matter of apprenticeship to be a "uniquely personal" right and submits that it cannot be such until an employee actually enters the apprenticeship program. This Court has recognized not every dissident group of employees holds the

right to controvert every employer-union agreement by urging his own interpretation thereof because the union, as the exclusive representative of *all* employees in the bargaining unit, must be allowed "[a] wide range of reasonableness . . . in serving the unit it represents". *Ford Motor Company v. Huffman*, 345 U.S. 330, at 338 (1953). This theory prevails even if the union's decision should cause some of its members to lose their employment or other contractual benefits, *e.g.*, *Humphrey v. Moore, supra*. Thus the act of bargaining over broad policy issues is the exclusive province of the union and vested solely in that agency, who must exercise that right for the benefit of *all* members. *May Department Stores Co. v. NLRB*, 326 U.S. 376 (1945). As was noted by the Court in *Brown v. Sterling Aluminum Products Corporation*, 365 F. 2d 651 (8th Cir. 1966), cert. denied, 386 U.S. 957:

"We believe, however, that for an individual to bring an action under §301 he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit. *Humphrey v. Moore*, 375 U.S. 335, 55 LRRM 2031 (1964). Therefore individual suits to compel arbitration of individual grievances are permissible as are individual suits to enforce an arbitration award in which the individual has a personal interest. *Smith v. Evening News Association, supra*. However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the Union as the sole representative of that unit would normally have the standing to enforce that right. Thus the individual would have no standing to compel discussion of broad collective bargaining principles such as the renegotiation of a new contract or the re-location of a plant, even if such discussion were required by the existing collective bargaining agreement. Section 159(a) of the Act designates the representatives selected by a majority of the employees in a unit, which in most cases would be a Union,

to 'be the exclusive elected representatives of all the employees in that unit for the purpose of collective bargaining.' It is the Union alone that has the right to bargain with management on these broad policy issues."

The Court of Appeals sought to bring its decision within the purview of these cases by engaging in a judicial determination that the contract mandated a continuous, ongoing, apprenticeship program and, therefore, the right to enter such program was sufficiently "vested" to sustain the individual's right to bring suit. This decision ignored the obvious fact, pleaded in the Complaint, that the union and Petitioner had made a contrary interpretation of the same contract clause for five years, almost two full contract terms. The question presented is therefore more subtle than a mere issue as to vesting, it embraces the very right of the union to negotiate, apply and enforce the contract for the benefit of the entire bargaining unit as opposed to the interests of a few who desire apprenticeship. Thus, it has been held that a union retains the power to apply the contract for the best interests of all members:

"National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom he represents . . . ' *Steele v. L & N.R. Co.*, 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment and provisions for processing his grievances; the union may even bargain

away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. 'The majority-rule concept is today unquestionably at the center of our federal labor policy.' 'The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, at 180 (1967).

Here too, District 9 has no less a right and an obligation to interpret and apply the fruits of its negotiations. Without that right there can be no central policy established by a labor agreement which is directed toward a given goal for the benefit of all parties. In its stead will be a contract whose verbage is subject to the contrary interpretation of those who had nothing to do with its creation and who are unencumbered by knowledge as to the intent of the parties who made the agreement. By interpreting the contract as "vesting" a right in the employee the Court of Appeals has ignored the basic premise of contract interpretation that a court must ascertain and give effect to the common intention of the parties. *17A C.J.S. Sec. 295*, p. 48. In sum:

"There is not much of a contract between the parties and there is not much stability of the Company-Union relationship, if an important term may be made in the operation of a plant because a dispute is traceable to its genesis in an individual grievance."¹¹ *Refinery Employees Union v. Continental Oil Company*, 268 F. 2d 447 (5th Cir. 1959), cert. denied 361 U.S. 896.

To permit the employees to collaterally interpret a collective bargaining agreement and to bring suit whenever their inter-

pretation differs from that of their union undercuts the very stability of labor-management relations which federal labor policy seeks to stabilize. Thus:

"If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiations." *Vaca v. Sipes*, 386 U.S. 171 at 191.

No less logic here applies, parties deprived of certainty and subject to the actions of intermeddlers, however well intentioned, cannot create an enduring relationship based upon understanding and reason, but will be forced to assume the most rigid of postures prescribed by counsellors and advisors in order to stave off interference. Labor peace will become labor strife all too often, and for altogether unnecessary reasons.

B. Contract Interpretation Before Trial/Arbitration.

The Court of Appeals also erred when it decided that the apprenticeship program was mandatory under the terms of the present contract. In the first instance the court had only the Complaint and the arguments of counsel before it. No evidence was before the Court relating to collective bargaining for the 1971 and 1974 contracts reflecting the intent and agreement of the parties, the egregious surplus of journeymen machinists from 1971 to present, and the full discussions between the employees and union at the time of ratification other than the "Summary of Changes" (Sup. App. 49). Further no evidence was before the court hearing upon the alleged "spurious" and "bad faith" nature of the alleged "informal agreement". Finally no evidence

was before the Court relating to any arbitrary or invidious discrimination practiced against the complaining employees.

It is quite apparent that the apprenticeship program was dormant for at least five years preceding this action as the Complaint clearly alleges that the so-called "informal agreement" between Petitioner and District 9 was consummated during the 1971 contract negotiations and not in 1974 as the Court of Appeals decision subsumes. Moreover, the presence of some twenty-five (25) Plaintiffs militates strongly against any claim that they were singled out for arbitrary or invidious discrimination within the meaning of *Vaca v. Sipes*, 386 U.S. 171 (1964).

Petitioner submits that it was wholly erroneous for the court below to engage in a judicial interpretation of the contract without benefit of evidence. In the first instance, if Plaintiffs were entitled to maintain a grievance as claimed, the appropriate remedy would be to compel arbitration. In an arbitration case an arbitrator, not a judicial body, is the proper party to interpret and apply a contract in the first instance. The established federal labor policy places emphasis upon the "context" in which labor contracts are negotiated and the agreed upon method of resolving disputes as to meaning and interpretation:

"In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is

a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, at 567-568.

In the recent decisions of *Buffalo Forge Co. v. Steelworkers of America*, 428 U.S. 397 (1976), this Court called attention to the harm which naturally follows a judicial intrusion into the realm of arbitration

"... this [judicial fact finding] would still involve hearings, findings and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would;" *Buffalo Forge v. USW*, *supra*, 96 S.Ct. at 3149.

Earlier this Court had said:

"Collective-bargaining contracts, however, generally contain procedures for the settlement of disputes through mutual discussion and arbitration. These provisions are among those which are to be enforced under § 301. Furthermore, Congress has specified in § 203(d), 61 Stat. 153, 29 U.S.C. § 173 (d) that '[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes . . .' This congressional policy 'can be effectuated only if the means chosen by the parties for settlement of their differences under a collective-bargaining agreement is given full play.'

United Steel Workers v. American Mfg. Co., 363 U.S. 564, 566 (1960). Courts are not to usurp those functions which collective-bargaining contracts have properly 'entrusted to the arbitration tribunal.' *Id.*, at 569. They should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes. Otherwise 'plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final.' *United Steel Workers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960)". *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 at 1055-1056.

The only exceptions recognized have been those instances where the arbitrators exceeded their powers, or there existed a fraud or breach of duty. *Humphrey v. Moore*, 375 U.S. 335, 351 (1964); *Vaca v. Sipes*, *supra*, 386 U.S. at 186; and in such instances it is clear that there must be a showing that the contract was breached, and that there existed a breach of duty by the union that exceeded "mere errors in judgment." *Hines v. Anchor*, *supra*, 96 S.Ct. at 1060. The Court of Appeals apparently again subsumed as fact that there existed some fraud or breach of duty, but that it cannot do because there is, as a matter of federal labor law:

"... the need to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives . . ." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, at 299 (1971).

This case falls short of the *Vaca*, *Humphrey v. Moore*, and *Lockridge*, decisions. It involves not discipline, but contract interpretation. The dispute is not the traditional one between labor and management, but between employees and their union and as such belongs not in the realm of arbitrary and invidious dis-

crimination but within the ambit of *Ford Motor v. Huffman*, 345 U.S. 330, 338 where this Court affirmed:

"A wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents . . ."

Consequently, if this Court disagrees with Petitioner and determines that the apprenticeship program is an individual right entitling the employees themselves to bring suit, it nevertheless remains necessary to require the Court of Appeals to follow established precedent and remand the case for trial to determine whether or not there was a bad faith refusal to represent and, if not, to determine whether or not arbitration should be ordered of the grievances.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Seventh Circuit should be reversed and remanded with instructions to sustain the dismissal of the District Court. In the alternative, the Court of Appeals decision should be reversed and remanded with respect to its interpretation of the terms of the collective bargaining agreement with instructions to allow all questions to be determined, after trial, at the District Court level.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Memorandum Order

This case is before me on defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted. In this connection I have considered the briefs and authorities submitted by counsel as well as the oral arguments presented on December 2, 1976. At the oral argument defendants submitted Defendants' Exhibit 2 which is or purports to be a "summary of change between Owens-Illinois Administrative Division Machine Manufacturing, Godfrey, Illinois, and the International Association of Machinists and Aerospace Workers, District #9" and plaintiff specifically abandoned its position that the hearing was called without sufficient notice as stated in its pleading filed herein on November 24, 1976.

The defendant Owens-Illinois, Inc., entered into a collective bargaining agreement with defendant District No. 9, International Association of Machinists and Aerospace Workers. Section 20 of the agreement provides:

ARTICLE 20

Apprentices

Section 1. It is agreed that the terms and the conditions of the Apprenticeship standards for machinists as developed by the International Association of Machinists, and Aerospace Workers District No. 9, shall remain in effect for the life of this contract. By agreement of the Union and the Company, the Apprenticeship Program in the Machine Manufacturing Shop has recognized and continues to recognize the practice of a restricted pool, that is, the selection of Apprentices from personnel within the shop in conjunction with the District No. 9 Joint Apprenticeship Committee.

Section 2. The normal ratio of apprentices shall be one (1) apprentice to every eight (8) Master Machinist in the department. Apprentices shall serve for a period of 8,000 hours in accordance with the Federal Apprenticeship Standard Agreement.

Section 3. Apprentice Rates

| Job No. | Percent of Job No. U-11 Master Machinist |
|----------------------------|---|
| U-63 Apprentice—8th Period | 94% |
| U-65 Apprentice—7th Period | 88% |
| U-67 Apprentice—6th Period | 83% |
| U-69 Apprentice—5th Period | 78% |
| U-71 Apprentice—4th Period | 73% |
| U-73 Apprentice—3rd Period | 68% |
| U-75 Apprentice—2nd Period | 63% |
| U-77 Apprentice—1st Period | 58% |

Apprentice rates shall be increased effective the first day of a new period following each 1,000 hours of employment.

Section 4. Normally apprentices shall not be used to instruct or train other apprentices. Instructing and training shall normally be done by Master Machinist or qualified operators.

The standing of individual union members to sue their employers as authorized by Section 301 of the Labor Management Sanctions (sic) Act, 29 U.S.C. § 185, is presented as a threshold question. Plaintiffs are individual union members who bring this suit claiming that the company's failure to provide an apprenticeship program violates their rights under the contract.

Ordinarily the union under Section 301 is the proper party to enforce the collective bargaining agreement. An exception to this rule is where the right sought to be vindicated is "uniquely personal" and rights of employees such as wages, hours, overtime pay and wrongful discharge. In this type of situation the individual may maintain suit under 301.

In my opinion the question of the duty of the company to maintain an apprenticeship program under the collective bargaining agreement is not "uniquely personal" to plaintiffs. From that conclusion it follows that plaintiffs lack standing to maintain this suit.

Although it is not necessary to reach the other points raised by defendants, I, nevertheless, agree that those points are well taken and require that the complaint herein be dismissed.

Based on the authorities cited I have no alternative but to dismiss the complaint for failure to state a claim on which relief can be granted.

So ordered.

Enter this 3 day of December, 1976.

J. WALDO ACKERMAN
United States District Judge

APPENDIX "B"

Memorandum Order Concerning Motion to
Amend, Modify and Reverse

Plaintiffs bring these motions concerning the Memorandum Order entered by this Court on December 3, 1976. Plaintiffs first seek pursuant to Federal Rule of Civil Procedure 52(b) to have this Court amend, modify and reverse its Order of December 3 dismissing plaintiffs' action for failure to state a claim on which relief could be granted.

That decision was premised on the conclusion that plaintiffs lacked standing to sue under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185) because the rights they sought to enforce under the collective bargaining agreement were not "uniquely personal" to plaintiffs. Plaintiffs contend that even if the rights sought to be enforced are not uniquely personal but rather flow to employees in general a § 301 action will lie if the petition alleges a breach of the duty of fair representation on the part of the union. I do not believe this to be the current state of the law.

It is clear that individuals may bring suit under § 301 to enforce the provisions of a collective bargaining agreement under certain circumstances. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 555, 562; *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). An allegation that the union involved breached its duty of fair representation will allow an individual to press his claims in the district court in spite of a defense that the employee failed to exhaust his contractual remedies, *Vaca v. Sipes*, 386 U.S. 171, 186 (1967) or in spite of the fact that the normally final decision of an arbitrator has been rendered against the individuals pressing the suit. *Hines v. Anchor Motor Freight, Inc.*, *supra*.

However, I believe that a threshold question before reaching any question of any breach of the duty of fair representation is whether the rights sought to be enforced are uniquely personal to the plaintiffs or whether they flow to the employees in general. It is clear that before an individual may bring an action pursuant to § 301 the rights asserted must be personal to him and vested in him at the time of the suit. *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651, 657 (8th Cir. 1966) *cert. den.* 386 U.S. 957 *reh. den.* 386 U.S. 1027 (1967).

Plaintiffs have cited no case which either dissuades me from this reasoning or would compel me to depart from my original conclusion that the duty of the company to maintain an apprenticeship program does not involve any rights uniquely personal to plaintiffs. Therefore, plaintiffs' motion to amend, modify and reverse shall be denied.

Plaintiffs' second motion to reduce security bond required of appellant, however, in light of defendants' acquiescence, and the reasoning presented in plaintiffs' motion, will be granted.

Plaintiffs' motion to amend, modify and reverse is denied. Bond for costs on appeal shall be fixed at fifty dollars (\$50.00).

Enter this 3 day of January, 1977.

/s/ (Illegible)

United States District Judge

APPENDIX "C"

In the
United States Court of Appeals
For the Seventh Circuit

No. 77-1078

John Schultz, et al.,

Plaintiffs-Appellants,

v.

Owens-Illinois, Inc., and District No. 9, International Association of Machinists and Aerospace Workers,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Illinois, Southern Division

No. A-Civ-76-0080—J. Waldo Ackerman, Judge

Heard May 24, 1977—Decided August 19, 1977

Before Swygert and Cummings, Circuit Judges, and Markey,
Chief Judge of U. S. Court of Customs and Patent Appeals.*

Cummings, Circuit Judge. Plaintiffs are 25 employees at the Godfrey, Illinois, machine manufacturing shop operated by defendant Owens-Illinois, Inc., an Ohio corporation. They are

* The Honorable Howard Thomas Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

members of co-defendant union.¹ Plaintiffs filed this complaint under Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185).

According to the complaint, the Union represents plaintiffs and other employees at the Godfrey plant. On December 16, 1974, Owens-Illinois and the Union entered into a collective bargaining agreement expiring on March 31, 1977. Plaintiffs charge that this agreement was entered into by defendants for the benefit of the employee union members, so that each plaintiff is "entitled to the benefit of said agreement and to enforce the provisions thereof" (Complaint ¶5).

Article 20 of the agreement provided:

Apprentices

"**Section 1.** It is agreed that the terms and the conditions of the Apprenticeship standards for machinists as developed by the International Association of Machinists, and Aerospace Workers, District No. 9, *shall* remain in effect for the life of this contract. By agreement of the Union and the Company, the Apprenticeship Program in the Machine Manufacturing Shop has recognized and continues to recognize the practice of a restricted pool, that is, the selection of Apprentices from personnel within the Shop in conjunction with the District No. 9 Joint Apprenticeship Committee.

"**Section 2.** The normal ratio of apprentices *shall* be one (1) apprentice to every eight (8) Master Machinists in the department. Apprentices *shall* serve for a period of 8,000 hours in accordance with the Federal Apprenticeship Standard Agreement.

¹ District No. 9, International Association of Machinists and Aerospace Workers.

"Section 3. Apprentice Rates

| Job No. | Percent of Job No. U-11 Master Machinists |
|----------------------------|--|
| U-63 Apprentice—8th Period | 94% |
| U-65 Apprentice—7th Period | 88% |
| U-67 Apprentice—6th Period | 83% |
| U-69 Apprentice—5th Period | 78% |
| U-71 Apprentice—4th Period | 73% |
| U-73 Apprentice—3rd Period | 68% |
| U-75 Apprentice—2nd Period | 63% |
| U-77 Apprentice—1st Period | 58% |

"Apprentice rates *shall* be increased effective the first day of a new period following each 1,000 hours of employment.

"Section 4. Normally apprentices *shall* not be used to instruct or train other apprentices. Instructing and training *shall* normally be done by Master Machinists or qualified operators." (Italic emphasis supplied; bold face emphasis in original).

Supposedly in breach of Article 20, no employee of defendant Company has been classified as an apprentice since May 22, 1975, nor allowed to enter the Apprentice Program well before then. This failure of defendant Company to place eligible employees into an apprenticeship program has allegedly deprived plaintiffs of an opportunity to increase their skills and training and improve their wages.

Plaintiff Schultz protested the absence of an apprentice program to his Union, and it filed a grievance on his behalf in April 1976. This grievance was processed pursuant to the

grievance procedure of Section 1 of Article 21 of the contract and rejected by defendant Company. Defendant Union refused to submit the grievance to arbitration under Section 2 of that Article. According to plaintiffs, the defendants conspired to defeat plaintiff Schultz' grievance, for in 1971 they had secretly agreed to eliminate the apprenticeship program in breach of the Union's duty of fair representation under 29 U.S.C. § 141.

As a result of the Company's failure to carry out its Article 20 apprenticeship program and the Union's breach of its duty of fair representation, plaintiffs assertedly lost the earnings difference between their current rate of pay and the higher rate of pay that they would have earned as Master Machinists. Moreover, because of the maximum age limit for apprentices, some plaintiffs, including plaintiff John Schultz, were permanently deprived of the opportunity of becoming apprentices, thus depriving them of Master Machinists' wages for the remainder of their working lives.

Plaintiffs sought a declaratory judgment that defendant Company violated Apprenticeship Article 20 of the agreement and that the defendant Union breached its duty of fair representation of plaintiffs. They also sought compensatory damages of \$500,000 and exemplary or punitive damages of \$500,000, and an order compelling the Company to abide by Apprenticeship Article 20 of the collective bargaining agreement by reinstating the apprenticeship program.

On September 21, 1976, defendant Union filed a motion to dismiss, asserting that the collective bargaining agreement was governed by the "Standards of Apprenticeship"² which supposedly did not require defendant company to continue an apprentice program when it "did not have sufficient available

² These standards were those incorporated by reference in Section 1 of Article 20 and are reproduced in the Supplemental Appendix to the Union's brief.

work to continue said program or full employment with its present journeymen employees." The motion also stated that the grievance procedure in Article 21 of the collective bargaining agreement did not require the Union to arbitrate plaintiff Schultz' grievance because it was "totally without merit." The other ground of the motion to dismiss was that the complaint failed to state a cause of action under 29 U.S.C. § 414 *et seq.*, the sections of Labor-Management Relations Act plaintiffs mistakenly had relied on with regard to the Union's alleged failure of fair representation before their September 24, 1976, amendment charging a breach of 29 U.S.C. § 141 *et seq.* The Company also filed a motion to dismiss, asserting that the complaint failed to state a claim.

In December 1976, the district court handed down a memorandum order dismissing the complaint for failure to state a claim. The court held that plaintiffs could not maintain a suit under Section 301 of the Labor-Management Relations Act because "the question of the duty of the company to maintain an apprenticeship program under the collective bargaining agreement is not 'uniquely personal' to plaintiffs."

A month later, the district court handed down another memorandum order refusing to modify its previous order. Plaintiffs maintained that even if the rights sought to be enforced were not uniquely personal, a § 301 action will lie because of the allegation of the breach by the Union of its duty of fair representation. The court reiterated that "before an individual may bring an[y] action pursuant to § 301, the rights asserted must be personal and vested in him at the time of the suit," citing *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651, 657 (8th Cir. 1966), certiorari denied, 386 U.S. 957. We reverse.

Ever since *Smith v. Evening News Ass'n*, 371 U.S. 195, 198-200, it is clear that Section 301 permits suits by employees

against their employer and union when they are seeking to vindicate uniquely personal rights granted them by the collective bargaining agreement. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562; *Vaca v. Sipes*, 386 U.S. 171.³ Both defendants urge this Court to affirm on the ground that plaintiffs do not have any "uniquely personal" rights to be trained as apprentices, so that Section 301 of the Labor-Management Relations Act affords them no remedy. We disagree.

To determine whether the rights plaintiffs seek to vindicate are "uniquely personal" rather than rights possessed by the bargaining unit as a whole, it is necessary to refer to Article 20, *supra*, of the collective bargaining agreement that was in effect until March 31, 1977. All four sections of the Article are in mandatory terms. The key section here is Section 2 providing that the normal ratio of apprentices shall be one to every eight Master Machinists. Defendants seek comfort in the Standards of Apprenticeship referred to in Section 1 of Article 20. However, Article 18 of those Standards, entitled "Ratio of Apprentices to Journeymen," provides:

"Ratio of apprentices to journeymen shall be in conformity with present or subsequent bargaining agreements between the employer and District 9" (Sup. App. 40).

As seen, that mandatory ratio is one apprentice to eight Master Machinists.⁴

³ Although defendant Company relies on *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, there the Supreme Court pointed out that a part of the national labor policy Congress has assured that minority employee voices should be heard and that a union must represent the interests of minorities within the unit fairly and in good faith. 420 U.S. at 64.

⁴ Because of this mandatory provision in Article 18 together with Article 20 of the bargaining agreement, four fragmentary phrases that the Union has selected from Articles 3, 5, 7 and 18 of the Standards of Apprenticeship relating to the employer's prerogatives vis-a-vis any particular apprenticeship applicant are irrelevant and do not transform this apprenticeship program into a voluntary one.

Defendants also contend that a September 30, 1974, "Summary of Changes Between Owens-Illinois Administrative Division Machine Manufacturing—Godfrey, Illinois and the International Association of Machinists and Aerospace Workers—District No. 9" modified the apprenticeship program from a mandatory to a voluntary one. On the contrary, that Summary of Changes was referring to the changes that the December 16, 1974, collective bargaining agreement was making in the previous collective bargaining agreement, and Article 8 of the Summary, the only article of the Summary referring to apprentices, states that the provisions of the earlier collective bargaining agreement "Remain as written" (Sup. App. 49). The clause in the Summary upon which defendants rely states "The Company will provide training for present employees when it deems it necessary." But this clause only governs changes in job classifications reflected in the new Appendix "A" to the December 16, 1974, collective bargaining agreement (Sup. App. 22-23, 62) and in no way concerns Article 20. Nothing in the Standards of Apprenticeship or in the Summary relieves defendants from the compulsory apprenticeship program established by Article 20 of the collective bargaining agreement.

These plaintiffs are not seeking to represent the entire work force of 366 employees (Union Br. 2). According to their counsel at oral argument, plaintiffs are the 25 most senior employees on a list maintained by the company of employees who are qualified to become apprentices. Various preliminary tests must be met in order to be eligible for apprenticeship in the first instance and, of this initial eligibility group, further tests and classes conducted outside the plant are required in order to be placed on the list. Traditionally, the list-qualified employee with the highest seniority would take the next available spot in the apprenticeship program assuming that individual was below the absolute age limit for beginning apprentices. Plaintiffs are asserted to be the very large majority of the list-qualified employees.

Defendants rightly point out that none of these specific were alleged in the complaint or appear anywhere in the record. However, in a hearing before Judge Ackerman, plaintiffs' counsel conclusorily claimed each named plaintiff would, with certainty, become an apprentice if the program was in effect. This hearing was not transcribed and an authorized summary pursuant to F.R.A.P. 10(c) was not entered because the district judge's recollection of the hearing was not precise enough to settle the dispute between the plaintiffs and the defendants concerning what was said therein. However, the district court did include the parties' differing versions of the hearing in the record on appeal. The defendants' version does not dispute the plaintiffs' statement concerning the certainty that the plaintiffs would be granted apprenticeships if anyone was granted one.

Overtime and discharge and other rights which have been deemed to be "uniquely personal" possess two unifying themes. *Smith v. Evening News Ass'n*, 371 U.S. 195, 199-200. First, the employment benefit is mandatory under the collective bargaining agreement if certain circumstances have occurred. Second, a factual predicate which is unique and personal to a particular employee establishes these necessary and sufficient circumstances. For example, in order to obtain overtime, a given employee must work a period longer than his normal shift, but perhaps a limit on the amount of overtime which can be worked in a given period is also set. Under this example, given mandatory overtime rights in the contract, a particular employee who works overtime still must show he meets the maximum hours criterion before he is actually entitled to overtime pay.

Applying these themes to the plaintiffs, we have demonstrated that the apprenticeship program was mandatory under the collective bargaining agreement which was in effect at the time the plaintiffs filed suit. Also, either under the plaintiffs' counsel's representations at oral argument or the versions of the hearing

in the record, plaintiffs have alleged a factual predicate which establishes the necessary and sufficient circumstances precedent to the actual vesting of the employment entitlement. Therefore, it was entirely appropriate for them to sue their employer and the Union under Section 301. *National Labor Relations Board v. Local 485, International Union of Electrical, Radio and Machine Workers*, 454 F.2d 17, 21 (2d Cir. 1972); *Emmanuel v. Omaha Carpenters District Council*, 535 F.2d 420, 423 (8th Cir. 1976).

Defendants rely almost exclusively on *Brown v. Sterling Aluminum Products Corporation*, *supra*. However, the *Brown* court recognized that individuals may bring an action under Section 301 where, as here, they are seeking to enforce personal rights vested in them at the time of the suit. As noted, these individuals are not seeking a right possessed by the bargaining unit as a whole⁵ and are not seeking to compel any collective bargaining. Only untrained employees are seeking controlled training of a high quality in order to improve their earning power. This factor sharpens the uniquely personal nature of the rights being sought, for the union membership as a group and recognized journeymen as well would receive no benefits from apprenticeships Article 20. Only the beneficiaries of rights under Article 20 have brought this suit, so that defendants and the court below are mistaken in asserting that plaintiffs' claim related to an entire bargaining suit. Therefore, even the *Brown* court would accord them standing to sue. See 365 F.2d at 657. Because the Union will not enforce plaintiff's apprenticeship rights, a

⁵ The Union contends that the complaint alleges "all employees" have been denied access to the apprenticeship program, so that the plaintiffs are not seeking to enforce any personal rights. However, a reading of the whole complaint discloses that only 25 employees, eligible as of the time of the complaint, are suing to enforce the apprenticeship program. Of the 366 employees, 207 are journeymen master mechanics and 159 are non-journeymen (Union Br. 2). Plaintiffs' counsel advised us at oral argument that his 25 clients represent the "bulk" of those qualified to be apprentices.

Section 301 suit is the appropriate remedy. *Emmanuel, supra*, 535 F.2d at 423.

Lastly, the Company relies on Article 1, the Management Rights Article⁶ contained in the December 16, 1974, collective bargaining agreement, but it does not even refer to apprentice training. Additionally, that article excepts from Management Rights matters "expressly modified by the specific provisions of this agreement." Article 20, the Apprenticeship article, is such a modification. Section 2 of Article 20 creates an affirmative obligation to provide an apprenticeship program while controlling the numbers of apprentices per journeymen. Otherwise, it would be virtually meaningless.

Plainly plaintiffs are seeking to protect rights afforded them under the collective bargaining agreement in force when their complaint was filed. Therefore, there is no occasion for us to decide whether they have any rights under the succeeding collective bargaining agreement whereby the apprenticeship program has apparently been made discretionary with the Company.⁷ Although the Company complains that if Article 20 is enforced, there will be an impact of excessive costs upon the

⁶ Article 1 provides:

"MANAGEMENT RIGHTS

"It is agreed that the Company is vested exclusively with the management of the business, including the hiring and direction of the working force; the right to establish, change or introduce new or improved methods, job duties and crew sizes, standards or facilities. *Except as expressly modified by the specific provisions of this Agreement*, and subject to the grievance and arbitration procedure provided herein, the Company has the right to promote, suspend, demote, discipline, or discharge for just cause; and the right to relieve employees from duty because of lack of work by plant seniority or for other legitimate reasons." (Sup. App. 3) (emphasis supplied)

⁷ This information was conveyed at oral argument but is not reflected in the record.

Company (Br. 12), that situation was evidently overcome under the new collective bargaining agreement. Only the named plaintiffs have any vindicable rights under the 1974 collective bargaining agreement since they are the only employees that filed suit on this tract while it was still in force.

As restated in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299, the union members may sue under Section 301 of the Labor-Management Relations Act to enforce rights conferred on them by an employer's promises in the collective bargaining agreement, and the union is a proper additional defendant if, as here, plaintiffs allege that their union breached the duty of fair representation. *Humphrey v. Moore*, 375 U.S. 335. Paragraph 10 of the complaint is sufficient to state a claim against the Union because it alleges that the negotiations between defendants with respect to Schultz' grievance were spurious and carried on in bad faith because of the Union's prior informal agreement with the Company to eliminate the apprenticeship program. If those allegations can be proved, it would have been futile for the other plaintiffs to file similar grievances. *Vaca v. Sipes*, 386 U.S. 171.

In remanding this case to the district court, we are not foreclosing any legitimate defenses the defendants may have relative to whether which or any of the ostensibly eligible plaintiffs would actually have been granted apprenticeship status. Nor do we express any view respecting the remedy to be afforded any ultimately prevailing plaintiff. We do hold that Article 20 of the December 16, 1974, collective bargaining agreement establishes a mandatory apprenticeship program and that it was not made voluntary by the Standards of Apprenticeship or by the September 30, 1974, Summary of Changes. Since plaintiff Schultz' grievance was meritorious on its face, defendant Union may not excuse its failure to process the grievance to arbitration on the ground that it was without merit.

The orders of December 3, 1976, and January 3, 1977, are reversed and the cause is remanded for further proceedings consistent herewith.

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX "D"

28 U.S.C.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

29 U.S.C.

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.